IMBI PLAZA MANAGEMENT CORPORATION v. PAUSON CORPORATION SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
AMARJEET SINGH SERJIT SINGH J
[CIVIL APPEAL NO: WA-12ANCvC-354-12-2021]
11 OCTOBER 2022

Abstract – *A proposed intervener in applying to intervene and be added as a party in a civil suit under O. 15 r. 6(2)(b) of the Rules of Court 2012 will be barred from intervening if it fails to raise anything to displace the general principle that it is against public policy, and oppressive to the party, to re-agitate disputes which have been litigated to a conclusion. An application to intervene can be thwarted by res judicata or issue estoppel concerning limitation, and if it is found that the proposed intervener's legal interest is not affected.*

CIVIL PROCEDURE: *Parties – Intervention – Application to intervene as party in suit – Whether application thwarted by res judicata – Privity of interest between parties – Whether proposed intervener had legal interest – Issue of limitation – Whether valid reasons arose to bar proposed intervener from intervening – Rules of Court 2012, O. 15 r. 6(2), (3)*

This was an appeal by the proposed intervener, Imbi Plaza Management Corporation ('IPMC') against the dismissal of its application to intervene as a party in Civil Suit 814 of 2018. IPMC applied to intervene either under paras. (b)(i) or (b)(ii) of O. 15 r. 6(2) of the Rules of Court 2012 ('ROC'). The defendant, Prudential Properties Sdn Bhd ('Prudential'), had initially entered into a sale and purchase agreement of the property with DP Consultants Service Pte Ltd ('the principal agreement'). *Vide* a sale and purchase agreement, the liquidator for DP Consultants sold the property to the plaintiff, Pauson Corporation Sdn Bhd ('Pauson') ('the second agreement'). Pauson and the said liquidator entered into a deed of assignment wherein the rights, obligations and interests under the principal agreement were assigned to Pauson. It was claimed that under the principal agreement, the purchaser was obliged to pay Prudential, as developer, service charges for maintaining the building and by virtue of the deed of assignment executed, the obligation passed onto Pauson. Subsequently, Prudential assigned its rights of collecting the service charges to Imbi Plaza Management Services Sdn Bhd pursuant to a deed of assignment dated 8 January 1997. IPMC averred that it was incorporated on 8 February 2007 as the management corporation of Imbi Plaza and had, pursuant to the Building and Common Property (Maintenance and Management) Act 2007 ('BCPA'), taken over the collection of charges from Imbi Plaza Management

Services Sdn Bhd. On 30 October 2007, Prudential gave notice to Pauson on the issuance of the subsidiary title to the property, followed with a letter by Prudential requesting Pauson to pay certain outstanding charges totalling RM223,070.27 before Prudential agrees to execute the memorandum of transfer. On 11 February 2008, Pauson sent a memorandum of transfer for the property to be transferred to its name and the deliverance of the original strata title of the property. A dispute between the parties arose when Prudential required the outstanding charges to be paid before the memorandum of transfer would be executed. Pauson commenced a civil suit ('Civil Suit 420 of 2014') against Prudential, seeking an order that Prudential execute a memorandum of transfer of the property in Pauson's favour and to deliver the original strata title for the property, Prudential opposed the action claiming failure to comply with the principal agreement on the payment of the charges and filed a counterclaim for the outstanding charges not paid to Imbi Plaza Management Services Sdn Bhd and which charges had with the imposition of late payment interest amounted to RM324,203.88. Pauson filed a reply disputing the propriety of the outstanding charges and that the counterclaim was barred by the Limitation Act 1953. After a full trial, the Sessions Court Judge ('SCJ') allowed Paulson's claim and dismissed Prudential's counterclaim on the ground of limitation. Prudential appealed to the High Court, but the appeal was dismissed. The High Court upheld the dismissal of the counterclaim on the ground of limitation. Prudential appealed to the Court of Appeal, which appeal was allowed in part. The order of the Court of Appeal provided, *inter alia*, that the dismissal by the Sessions Court of the counterclaim for outstanding charges amounting to RM324,203.88 was upheld. The consequence of the dismissal was that the outstanding charges claimed from Pauson were time barred. Since the ownership of the property was still an issue, Pauson demanded that the memorandum of transfer be executed by Prudential and for the deliverance of the original strata title. Prudential responded by demanding Pauson to settle the same outstanding charges that were dismissed in Civil Suit 420 of 2014. Pauson then commenced Civil Suit 814 of 2018, applying for declarations of its legal rights concerning the ownership of the property. Prudential maintained that Pauson was indebted to it for the same outstanding charges which were held time barred in Civil Suit 420 of 2014 and that Pauson's claim for the declarations were *res judicata*. Prudential applied to strike out Civil Suit 814 of 2018 on the ground of *res judicata*, which was allowed by the Sessions Court and the decision was upheld by the High Court on appeal. However, the Court of Appeal reversed the striking out order and remitted the matter back to the Sessions Court for trial. Upon the matter being remitted to the Sessions Court, IPMC filed the application to intervene in the said civil suit. The SCJ dismissed IPMC's application to intervene and held that the IPMC failed to show its 'legal interest' that would be affected by any judgment given concerning the declarations of right and

consequential relief sought by Pauson concerning the property. It was also held that IPMC's application was barred by *res judicata* by virtue of the final decision in Civil Suit 420 of 2014 and also the claims for the same outstanding charges – Claim 3687 and Claim 3501 – brought by IPMC against Pauson at the Strata Management Tribunal that were dismissed. Hence, this appeal. The issue that arose was whether the SCJ properly and rightly refused IPMC's application to intervene and be added as a party under O. 15 r. 6(2)(b) of the ROC.

Held (dismissing appeal):

(1) The principles concerning a non-party seeking to intervene as a party is governed under paras. (b)(i) or (b)(ii) of O. 15 r. 6(2) and O. 15 r. 6(3) of the ROC. A proposed intervener is to show by affidavit either (i) the proposed intervener's interest in the matters in dispute or (ii) the question or issue to be determined as between him and any party to the cause or matter. The exercise of discretion in allowing or not allowing leave to intervene depended on the particular facts adduced in the affidavit produced in support of the application. The court must be vigilant in not falling into the trap of making findings of fact that ought to be made at the trial of the civil suit. Each case is to be decided on the reason averred in the affidavit filed in support of the application. (paras 24 & 25)

(2) The SCJ was correct in holding that the counterclaim by Prudential was *res judicata* and that there was no 'legal interest' concerning the property for which IPMC's presence was necessary. The issue of *res judicata* arose in two ways. The first was that the claim for the same outstanding charges by Prudential in Civil Suit 420 of 2014 was dismissed for being statute barred under the Limitation Act 1953. Although IPMC claimed that it was not a party to the said civil suit, and therefore, the doctrine did not arise as an impediment to its application to intervene, and that the doctrine does not apply where the parties are different, this submission was not entirely accurate as there are exceptions to the general principle. The first exception is that *res judicata* expresses a general public interest policy that the same issue or cause of action should not be litigated more than once even if the parties are different. The exception is connected to the issue of 'privity of interest'. Pauson had raised the issue that IPMC was a privy of Prudential having the exact same interest concerning the same outstanding charges. The test of sufficient degree of identification between IPMC and Prudential was amply met. IPMC was said to have taken over the collection of charges that were unpaid from Prudential *albeit* through Imbi Plaza Management Services Sdn Bhd. For all intents and purposes, there was privity of interest between Prudential and IPMC. More so, where the latter

A consisted of both the developer and proprietors of Imbi Plaza. IPMC was therefore Prudential's privy and thus IMPC's application to intervene was thwarted by *res judicata*. (paras 28-32)

(3) Civil Suit 420 of 2018 had already decided that the same charges were barred by limitation under the Limitation Act 1953. With the appeal B process exhausted, the decision of the Court of Appeal in Civil Suit 420 of 2018 became final and binding. The issue of limitation could not therefore be reopened and made a basis for IPMC to intervene. Such action would be an abuse of the process of the court. As for the issue of *res judicata* concerning Claim 3687 and Claim 3501 at the Strata C Management Tribunal, both these claims were filed by IPMC against Pauson claiming the same outstanding charges that were claimed by Prudential in the Civil Suit 420 of 2014. Claim 3687 was dismissed given that the same outstanding charges were the subject matter of Civil Suit 420 of 2014. IPMC did not challenge the decision. Subsequently D IPMC filed Claim 3501 which was also dismissed based on the decision of the Court of Appeal in Civil Suit 420 of 2014. This time IPMC challenged the correctness of the decision by way of judicial review but leave to commence judicial review proceedings was dismissed. IPMC ought to have appealed against the dismissal at the Court of Appeal. The E failure rendered the decision of the Tribunal final and binding between IPMC and Pauson by virtue of s. 120(1) of the Strata Management Act 2013 ('SMA'). Thus, the decision in Claim 3501 was final and binding on IPMC in respect of the outstanding charges. In the circumstances, this was a separate reason that barred IPMC intervening in the civil suit. (paras 34-36)

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(4) IPMC had not raised anything to displace the general principle that it was against public policy, and oppressive to the party to re-agitate disputes which had been litigated to a conclusion. Raising hardship of the decision or the effect of the decision was not enough. This was not G a case where the issue estoppel did not apply or where the court lacked jurisdiction to make the order or where in the second suit the defective *locus standi* which resulted in the earlier suit being dismissed was rectified. Herein, the issue of limitation was the issue precisely raised and ventilated to final adjudication. Limitation was the basis of the judgment in Civil Suit 420 of 2014. (para 39)

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(5) IPMC had no right to claim the outstanding charges as stated in the statement of accounts of Imbi Plaza Management Services Sdn Bhd. Its legal interest was not affected. IPMC raised the issue that its right to claim outstanding charges under s. 59(2) of the SMA would be affected. I Thus, it was for IPMC to show how this section was applicable to the outstanding charges for the period of 1 July 1998 to 20 June 2008. IPMC said that it was incorporated from 8 February 2007 as a

management corporation under the BCPA and it continued under the SMA when the latter came into operation on 1 June 2015 and therefore was entitled to rely on s. 59(2) of the SMA to claim the outstanding charges. But the story of IPMC was contrary to and not borne out by contemporaneous documentary evidence. The first of which was the certificate of incorporation of IPMC which showed that IPMC was automatically incorporated pursuant to s. 39 of the Strata Titles Act 1985 ('STA'). But the document was only certified and confirmed on 5 March 2012. The second document was the statement of accounts alleging the outstanding charges was that of Imbi Plaza Management Services Sdn Bhd wherein the last item was dated 20 June 2008. This could only mean that IPMC had, at the said date, not taken over from Prudential. (paras 40-42)

(6) At the time the BCPA came into force on 12 April 2007, the certificate incorporating IPMC was yet to be issued. It was only issued five years later on 5 March 2012 pursuant to the STA. Evidence showed that the first time that the IPMC tried to collect the outstanding charges under its own name was at the Strata Management Tribunal on 8 December 2017 based on the statement of accounts of Imbi Plaza Management Services Sdn Bhd. Therefore, IPMC was not established under the BCPA. There was no transition of IPMC from the BCPA to the SMA. In the circumstances, there was no transfer from Prudential, as developer, to IPMC under the BCPA. (para 44)

Case(s) referred to:

Ali Tan Sri Abdul Kadir & Ors v. Simpang Empat Plantation Sdn Bhd [2008] 5 CLJ 305 FC ***(refd)***

Chee Pok Choy & Ors v. Scotch Leasing Sdn Bhd [2001] 2 CLJ 321 CA ***(refd)***

Chong Fook Sin v. Amanah Raya Bhd & Ors [2010] 7 CLJ 917 FC ***(refd)***

Dato' Sivananthan Shanmugam v. Artisan Fokus Sdn Bhd [2015] 2 CLJ 1062 CA ***(refd)***

Ekuiti Setegap Sdn Bhd v. Plaza 393 Management Corporation [2019] 2 CLJ 592 CA ***(dist)***

Francis Joseph Puthucheary v. Eng Securities Sdn Bhd [2015] 4 CLJ 433 CA ***(refd)***

Hong Leong Bank Bhd v. Staghorn Sdn Bhd & Other Appeals [2008] 2 CLJ 121 FC ***(refd)***

Lee Ming Chong Sdn Bhd v. Prudential Properties Sdn Bhd [2011] 1 LNS 1322 HC ***(refd)***

Letchumanan Gopal v. Pacific Orient & Co Sdn Bhd [2011] 5 CLJ 866 CA ***(refd)***

Pegang Mining Company Ltd v. Choong Sam & Ors [1968] 1 LNS 96 PC ***(refd)***

Perbadanan Pengurusan Megan Avenue 1 v. Harcharan S Sidhu & Anor [2017] 9 CLJ 563 HC ***(dist)***

Simpang Empat Plantation Sdn Bhd v. Ali Tan Sri Abdul Kadir & Ors [2006] 1 CLJ 41 CA ***(refd)***

Spelling Goldberg Productions v. BPC Publishing Ltd [1981] RPC 280 ***(refd)***

Tanalachimy Thoraisamy & Ors v. Jayapalasingam Kandiah Yong Yoon Shing & Anor [2014] 1 LNS 340 CA ***(refd)***

Vandervell Trustees Limited v. White [1971] AC 912 ***(refd)***

Legislation referred to:
Limitation Act 1953, s. 6
Rules of Court 2012, O. 14A, O. 15 r. 6(2)(b)(i), (ii), (3)
Strata Management Act 2013, ss. 59(2), 105(2), 120(1)
Strata Titles Act 1985, ss. 17, 39(2A)

For the appellant - Mark Ho & Pang Li Xuan; M/s Chellam Wong
For the respondent - GK Ganesan & KN Geetha; M/s GK Ganesan

Reported by Suhainah Wahiduddin

JUDGMENT

Amarjeet Singh Serjit Singh J:

Introduction

[1] This is an appeal by the proposed intervener, Imbi Plaza Management Corporation ("IPMC") against the dismissal of its application dated 24 May 2021 to intervene as a party in Kuala Lumpur Sessions Court Civil Suit No. WA-A52NCvC-814-09-2018 ("Civil Suit 814 of 2018"). IPMC applied to intervene either under paras. (b)(i) or (b)(ii) of O. 15 r. 6(2) of the Rules of Court 2012.

[2] In this judgment the parties are referred to as they were in the court below. Civil Suit 814 of 2018 was a dispute between Pauson Corporation Sdn Bhd, the plaintiff ("Pauson") and Prudential Properties Sdn Bhd, the defendant ("Prudential"). Pauson was a purchaser who had purchased a lot in a building developed by Prudential known as Imbi Plaza. In the said civil suit Pauson was seeking declarations of its legal rights, namely, that it is the beneficial owner of Lot 6.18, 6th Floor, Imbi Plaza ("the property") and does not owe Prudential, as developer, any monies in the form of outstanding charges or interest thereon. Pauson also sought a consequential order that Prudential executes a memorandum of transfer in its favour.

[3] Prudential filed a defence stating that it had a contractual right not to execute the memorandum of transfer until Pauson has paid the said outstanding charges with interest. Prudential also filed a counterclaim claiming the said disputed outstanding charges from 1 July 1998 to 31 December 2007 which at 29 February 2020 stood at RM324,203.88 with late payment interest.

[4] On 28 June 2022, I dismissed the appeal. The reasons for my decision are as follows.

Background

[5] Prudential had initially entered into a sale and purchase agreement of the property with DP Consultants Service Pte Ltd ("the principal agreement"). On 20 November 1981 *vide* a sale and purchase agreement the

liquidator for DP Consultants Service Pte Ltd sold the property to Pauson ("the second agreement"). Pauson had paid the liquidator RM426,360 being the full purchase price under the second agreement for the property.

[6] On 11 January 1982, Pauson and the said liquidator entered into a deed of assignment wherein the rights, obligations and interests under the principal agreement were assigned to Pauson. Prudential had consented to and confirmed receipt of the said deed of assignment.

[7] It was claimed that under the principal agreement, the purchaser was obliged to pay Prudential, as developer, service charges for maintaining the building and by virtue of the deed of assignment executed on 11 January 1982 the obligation passed on to Pauson. Subsequently, on 8 January 1997, Prudential assigned its rights of collecting the service charges to Imbi Plaza Management Services Sdn Bhd pursuant to a deed of assignment dated 8 January 1997.

[8] There were also disputes concerning the charges imposed by Imbi Plaza Management Services Sdn Bhd by other proprietors and some of disputes were taken to court. Some were settled on appeal to the High Court. One such dispute is the case of *Lee Ming Chong Sdn Bhd v. Prudential Properties Sdn Bhd* [2011] 1 LNS 1322 where Lee Swee Seng JC (as His Lordship then was) held that Imbi Plaza Management Services Sdn Bhd was not licenced to provide such service under the Valuers, Appraisers, Estate Agents and Property Managers Act 1981. In that case, Prudential had imposed conditions for the sub-sale of the lot owned by the plaintiff. One condition was the payment of the arrears of service charges. There was a dispute as to the amount of service charges and whether the payments could be collected by Imbi Plaza Management Services Sdn Bhd. The dispute caused a delay which in turn caused the sub-sale deal to fall through. It was held that the imposition of the condition to the sub-sale tantamount to unreasonably withholding of consent of the sub-sale for which Prudential was ordered to pay damages.

[9] The case of *Lee Ming Chong Sdn Bhd* (*supra*) also referred to the history of disputes between purchasers and their developers which had eventually led to the Building and Common Property (Maintenance and Management) Act 2007 ("BCPA") being legislated to regulate the industry. The BCPA came into force on 12 April 2007 and its preamble states that it is an act "to provide for the proper maintenance and management of buildings and common property, and for matters incidental thereto".

[10] IPMC, in its affidavit in support, affirmed by its chairman, averred that it was incorporated on 8 February 2007 as the management corporation of Imbi Plaza and had pursuant to the BCPA taken over the collection of charges from Imbi Plaza Management Services Sdn Bhd. The incorporation of a management corporation is automatically made upon opening of a book of the strata register for the building using the building's name under s. 17

of the Strata Titles Act 1985 ("STA 1985"). However, in the instant case the certificate of incorporation was only certified and confirmed on 5 March 2012 under s. 39(2A) of the STA 1985 (the whole part which housed this section was subsequently repealed by the Strata Titles (Amendment) Act 2013 *vide* Act A1450 with effect from 1 June 2015). The date 1 June 2015 is important. It is the same date that the Strata Management Act 2013 ("SMA") came into operation *vide* PU(B) 237/2015 and also the date the BCPA was repealed by the SMA. However, the repeal of the BCPA did not affect the incorporation of IPMC as the management corporation of Imbi Plaza.

[11] On 30 October 2007, Prudential gave notice to Pauson on the issuance of the subsidiary title to the property. This was followed with a letter dated 31 December 2007 by Prudential's solicitors requesting Pauson to pay certain outstanding charges totalling RM223,070.27 before Prudential agrees to execute the memorandum of transfer. These charges were derived from the statement of account provided by Imbi Plaza Management Services Sdn Bhd.

[12] On 11 February 2008, Pauson, sent a memorandum of transfer for the property to be transferred to its name and the deliverance of the original strata title of the property. A dispute between the parties arose when Prudential required the outstanding charges to be paid before the memorandum of transfer would be executed. The stalemate between the parties was broken on 27 August 2014 with Pauson commencing Civil Suit No. A52NCvC-420-08-2014 at the Kuala Lumpur Sessions Court ("Civil Suit 420 of 2014") against Prudential.

[13] In Civil Suit 420 of 2014, Pauson sought an order that Prudential executes a memorandum of transfer of the property in Pauson's favour and to deliver the original strata title for the property. Prudential opposed the action claiming failure to comply with the principal agreement on the payment of the charges and filed a counterclaim for the outstanding charges not paid to Imbi Plaza Management Services Sdn Bhd and which charges had with the imposition of late payment interest amounted to RM324,203.88 as at 19 February 2014. Pauson filed a reply disputing the propriety of the outstanding charges and more importantly that the counterclaim was barred by the Limitation Act 1953. At this date of the filing of the civil suit the SMA had not yet come into operation and the Strata Management Tribunal did not exist as it was a creature created by the SMA. The SMA only came into operation on 1 June 2015 *vide* PU(B) 237/2015.

[14] After a full trial the Sessions Court Judge, on 19 July 2016, allowed Pauson's claim and dismissed Prudential's counterclaim on the ground of limitation. Prudential appealed to the High Court *vide* Civil Appeal No. WA-12BNCvC-130-08-2016. On 8 September 2017 the High Court dismissed the appeal and upheld the dismissal of the counterclaim on the ground of limitation. Prudential appealed to the Court of Appeal *vide* Civil

Appeal W-04(NCvC)(W)-432-10-2017. On 17 April 2018, the Court of Appeal allowed the appeal in part. The order of the Court of Appeal provided as follows:

(i) The decision of the Sessions Court granting the order to execute the memorandum of transfer is set aside.

(ii) The dismissal by the Sessions Court of the counterclaim for outstanding charges amounting to RM324,203.88 is upheld.

(iii) The costs awarded in the Sessions Court and the High Court were set aside and no order of costs was made at the Court of Appeal.

[15] The consequence of the dismissal was that the outstanding charges claimed from Pauson were time-barred. Since, the ownership of the property was still an issue, Pauson by letters dated 22 May 2018 and 6 June 2018 demanded that the memorandum of transfer be executed by Prudential and for the deliverance of the original strata title. Prudential, in a letter dated 11 June 2018, responded by demanding Pauson to settle the same outstanding charges that were dismissed in Civil Suit 420 of 2014 which with interest stood at RM359,976.90. The position taken by Prudential caused Pauson, on 3 September 2018, to commence Civil Suit 814 of 2018.

Civil Suit 814 Of 2018

[16] In Civil Suit 814 of 2018, Pauson applied for declarations of its legal rights concerning the ownership of the property. In its amended defence, Prudential maintained that Pauson is indebted to it for the same outstanding charges which were held time-barred in Civil Suit 420 of 2014 and that Pauson's claim for the declarations were *res judicata*. To support its case Prudential relied on sub-cls. (b), (c) and (e) of cl. 4.01 and cl. 5.04 of the principal agreement as providing the basis of the condition to be fulfilled before its obligation to deliver the executed memorandum of transfer and deliverance of the issue document of title would arise.

[17] Prudential applied to strike out Civil Suit 814 of 2018 on the ground of *res judicata*. The application was allowed by the Sessions Court and the decision was upheld by the High Court on appeal. However, the Court of Appeal on 9 January 2020 reversed the striking-out order and remitted the matter back to the Sessions Court for trial. The declarations of right sought were obviously different from the relief sought in Civil Suit 420 of 2018.

Application To Intervene: Subject Matter Of The Present Appeal

[18] Upon the matter being remitted to the Sessions Court two applications were made. The first was filed on 29 July 2020 by Pauson for the disposal of the matter on point of law and construction under O. 14A of the Rules of Court 2012. The second application, is the subject matter of the instant appeal, was filed on 24 May 2021 by IPMC to intervene in the said civil suit.

A **Decision Of The Sessions Court**

[19] The learned Sessions Court Judge dismissed IPMC's application to intervene after considering the affidavits and submissions of the parties. It was held that IPMC failed to show its "legal interest" that would be affected by any judgment given concerning the declarations of right and consequential
B relief sought by Pauson concerning the property. IPMC was a stranger to the principal agreement read with the second agreement and the deed of assignment dated 11 January 1982. It was held that IPMC's application was barred by *res judicata* by virtue of the final decision in Civil Suit 420 of 2014 and also the claims for the same outstanding charges – Claim 3687 and Claim
C 3501 – brought by IPMC against Pauson at the Strata Management Tribunal that were dismissed.

[20] There were also other reasons, such as, that the application to intervene contravened s. 106 of the SMA, there was an unexplained delay in applying to intervene in the civil suit, the proposed intervener had not
D complied with ss. 34 and 78 of the SMA, and that the claim for the outstanding charges is barred by s. 6 of the Limitation Act 1953.

Deliberations And Decision

[21] IPMC claimed that it is entitled to intervene either under para. (b)(i)
E or para. (b)(ii) of O. 15 r. 6(2) (see para. 6 at p. 73 Rekod Rayuan Jilid 1). The issue in this appeal was whether the learned Sessions Court Judge properly and rightly refused IPMC's application to intervene and be added as a party under O. 15 r. 6(2)(b) of the Rules of Court 2012.

[22] In the memorandum of appeal, it was alleged that the learned Sessions
F Court Judge erred in law and in fact in not allowing IPMC to intervene for the following reasons:

(i) in not holding that IPMC has a "legal interest" under s. 59(2) of the SMA to make claims against Pauson in respect of the outstanding charges and that such legal interest will be affected by any judgment
G made in the civil suit (paras. 1, 7 and 8);

(ii) in not holding that the Limitation Act 1953 does not apply to a claim by IPMC as management corporation where the amount claimed was never paid by Pauson (paras. 2 and 5);

H (iii) in failing to hold that *res judicata* does not apply as IPMC was not a party in Civil Suit 420 of 2014 (para. 3);

(iv) in failing to hold that *res judicata* does not apply as the claims made by IPMC at the Strata Management Tribunal were dismissed based on legal issues and were never heard on merit (para. 4);

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(v) in failing to hold that the *res judicata* ought not to be applied where it would lead to an unjust result had the *ratio decidendi* in the Court of Appeal decision of *Simpang Empat Plantation Sdn Bhd v. Ali Tan Sri Abdul Kadir & Ors* [2006] 1 CLJ 41 been applied (para. 6).

The Principles

[23] In considering the matter I kept in mind, apart from the established principles on appellate function, the principles concerning a non-party seeking to intervene as a party under para. (b)(i) or (b)(ii) of O. 15 r. 6(2) which can be summarised as follows:

(i) A party may be added if the party's "legal interests" will be affected by any judgment in the action but not if the party's "commercial interests" alone would be affected under either paragraph of O. 15 r. 6(2)(b). The applicable test is that stated by Lord Diplock in the landmark case of *Pegang Mining Company Ltd v. Choong Sam & Ors* [1968] 1 LNS 96; [1969] 2 MLJ 52: whether the proposed intervener's rights against or liabilities to any party to the action in respect of the subject matter of the action would be directly affected by any order which may be made in this action?

(ii) There is no jurisdiction to add as a party to an existing action a party by and against whom no relief which the court has jurisdiction to grant can be claimed (per Viscount Dilhorne in *Vandervell Trustees Limited v. White* [1971] AC 912).

(iii) At the time the order is made the question or issue arising out of, or relating to, or connected with the relief or remedy claimed in the cause already arises between the party seeking to be joined and one or other of the existing parties to the litigation. If no such question or issue arises then there is no jurisdiction in the court to accede to the application (*Spelling Goldberg Productions v. B.P.C. Publishing Ltd* [1981] RPC 280).

[24] An application to intervene as a party is further governed by O. 15 r. 6(3) of the Rules of Court 2012 which provides that a proposed intervener is to show by affidavit either (i) the proposed intervener's interest in the matters in dispute or (ii) the question or issue to be determined as between him and any party to the cause or matter. The Federal Court in *Hong Leong Bank Bhd v. Staghorn Sdn Bhd & Other Appeals* [2008] 2 CLJ 121) established the following principle concerning O. 15 r. 6 of the Rules of the High Court 1980 ("RHC 1980") which is in *pari materia* with the equivalent provision in the Rules of Court 2012 and therefore applicable in the instant case:

> [60] Thirdly, an application for leave to intervene is supported by an affidavit. In other words, in such an application, the judge merely decides on affidavit evidence, whether or not leave should be granted. At that stage, the judge should not make a definite findings of fact which, as envisaged by O. 15 r. 6 of the RHC 1980, will and can only be made after all evidence has been adduced in the trial which will follow subsequently.

[25] Thus, the exercise of discretion in allowing or not allowing leave to intervene depends on the particular facts adduced in the affidavit produced in support of the application and the court must be vigilant in not falling into the trap of making findings of fact that ought to be made at the trial of the civil suit. Most crucially, it means that each case is to be decided on the reason averred in the affidavit filed in support of the application.

The Proposed Intervener's Affidavit

[26] In applying the above principles, the starting point is to see whether IPMC has through its affidavit filed in support of the application, affirmed by its chairman, satisfied the requirements of O. 15 r. 6(3). The relevant averments in the affidavit state as follows:

(i) Before the formation of IPMC, Imbi Plaza Management Services Sdn Bhd was authorised by Prudential to collect the charges *vide* a deed of assignment dated 8 January 1997 (para. 8).

(ii) On 8 February 2007 IPMC was established as the management corporation of Imbi Plaza and pursuant to the BCPA and thereafter the Strata Management Act 2013, took over from Imbi Plaza Management Services Sdn Bhd the right and duty to collect the charges from the proprietors of Imbi Plaza (para. 9);

(iii) Pauson owes charges to the amount of RM384,666.02 from 1 July 1998 to 20 June 2008 according to IPMC's statement of accounts dated 29 February 2020 which is the basis of Prudential's counterclaim against Pauson (para. 10 and exh. CCL3).

(iv) In Civil Suit 420 of 2014, Pauson sought an order to compel Prudential to execute a valid and registrable memorandum of transfer of the property and Prudential responded by filing a counterclaim for the said outstanding charges (para. 11).

(v) The Court of Appeal on 17 April 2018 affirmed the Sessions Court's decision dismissing the counterclaim on the ground of limitation but set aside the order to execute the memorandum of transfer of the property (paras. 12 & 13).

(vi) IPMC had on 8 December 2017 commenced a claim against Pauson at the Strata Management Tribunal ("Claim 3687") for the outstanding charges but it was alleged that the Tribunal dismissed the claim on the ground of jurisdiction in view of the existence of Civil Suit 420 of 2014 (para. 14).

(vii) On 29 August 2018, IPMC made another claim against Pauson for the same outstanding charges at the Strata Management Tribunal ("Claim 3501"). The Tribunal held that since the claim for the same charges by Prudential, which was IPMC's predecessor, had been dismissed on the limitation ground Claim 3501 made by IPMC was *res judicata* (para. 15).

(viii) That since it has been Pauson's stand that Prudential and Imbi Plaza Management Services Sdn Bhd do not have the right to collect the charges the proper party to claim the charges is IPMC (paras. 19). A

(ix) That since the Tribunal had failed to consider all the issues raised by IPMC in Claim 3501 there exist serious irregularity in the Tribunal's order. The chose in action were effectively transferred to IPMC upon its formation in 2007 (para. 20). B

(x) That since IPMC was never privy to the Civil Suit 420 of 2014 proceedings at the Sessions Court, High Court and Court of Appeal the doctrine of *res judicata* cannot be applied by the Tribunal. (para. 21). C

(xi) In view of the fact that the right to collect the charges resides with IPMC, it follows that the presence of IPMC is required for the complete and effectual determination of rights between the parties. As such IPMC's legal rights and commercial interest in respect of the charges are affected (para. 24). D

[27] In the said affidavit the only ground to intervene was described as follows: the presence of IPMC is required for the complete and effectual determination of rights between the parties premised on the transfer from Prudential to IPMC, upon the latter's formation on 8 February 2007, of the right to collect the charges. The right is said to be derived from the BCPA E and subsequently the SMA on the former being repealed.

Res Judicata

[28] In my view, the learned Sessions Court Judge was correct in holding that the counterclaim by Prudential was *res judicata* and that there was no F "legal interest" concerning the property for which IPMC's presence is necessary. In this regard, the Federal Court established in *Chong Fook Sin v. Amanah Raya Bhd & Ors* [2010] 7 CLJ 917 that a party is not in a position to intervene if that party is impeded by *res judicata* in the following words:

> [36] ... Quite apart from the requisite 'legal interest', an applicant must G establish that he is not precluded by any other circumstances from making such an application.
>
> [37] Such precluding circumstances would include a prior determination of the courts that gave rise to an issue estoppel such as to attract the doctrine of *res judicata*. A party so impeded would not be in a position to H seek leave to intervene.

[29] The issue that arises is whether IPMC was impeded by *res judicata* and therefore it was correct in law to refuse the application to intervene. The issue of *res judicata* arose in two ways. The first was that the claim for the same outstanding charges by Prudential in Civil Suit 420 of 2014 was I dismissed for being statute-barred under the Limitation Act 1953.

[30] IPMC claims that it was not a party to the said civil suit and therefore the doctrine does not arise as an impediment to its application to intervene. IPMC contended that the doctrine does not apply where the parties are different. This submission is not entirely accurate as there are exceptions to the general principle. The first exception is that *res judicata* expresses a general public interest policy that the same issue or cause of action should not be litigated more than once even if the parties are different (see *Letchumanan Gopal v. Pacific Orient & Co Sdn Bhd* [2011] 5 CLJ 866). The principle was reaffirmed in *Dato' Sivananthan Shanmugam v. Artisan Fokus Sdn Bhd* [2015] 2 CLJ 1062 where Idrus Harun JCA (later FCJ) said:

> [25] In the present appeal, since the present action would undoubtedly involve going over precisely the same facts as in the previous HTF suit, and accepting the broader approach and the wider sense of *res judicata* as the preferred and correct legal position, the fact that the parties to this suit are different from the HTF suit does not disentitle the appellant to invoke the doctrine of issue estoppel to bar the respondent from relitigating a specific issue that had been decided in the prior separate action. The doctrine also applies to a non-party. It is therefore not necessary for parties to be the same in both actions. What the doctrine seeks to prevent is an abuse of the process of the court by attempting to make a double claim as well as allowing the plaintiff to relitigate its cause for the same relief and based on the same subject matter for which judgment had successfully been obtained in the HTF suit and to produce the same set of facts, the same witnesses and the same documents (see *Seruan Gemilang Makmur Sdn Bhd v. Badan Perhubungan UMNO Negeri Pahang Darui Makmur, supra* [2009] 1 LNS 1457).

[31] The exception is connected to the issue of "privity of interest". In the instant appeal and before the learned Sessions Court Judge, Pauson raised the issue that IPMC was a privy of Prudential having the exact same interest concerning the same outstanding charges. The principle was stated by Mohamad Ariff JCA in the *Tanalachimy Thoraisamy & Ors v. Jayapalasingam Kandiah Yong Yoon Shing & Anor* [2014] 1 LNS 340; [2015] 2 MLRA 415 in the following words:

> [43] On the issue of whether the present plaintiffs are "privies" or have a "privity in interest" with the plaintiffs in the origination summons action, the cases have not adopted a very wide concept for these terms. Counsel for the first respondent has referred us to the meaning of "privies" as expounded in *Cheng Hang Guan & Ors v. Perumahan Farlim (Penang) Sdn Bhd* [1988] 3 MLJ 90, which in turn adopts the analysis of Lord Reid in *Carl-Zeiss Stiftung v. Rayner & Keeler Ltd* [1966] 2 All ER 536. To enumerate a few categories mentioned in *Carl-Zeiss Stiftung, supra*, they include the following:
>
> (a) any person who succeeds to the rights or liabilities of a party after his death;

(b) personal representatives;

(c) assignees;

(d) liquidators; and

(e) successors in title to land.

[44] From the above enumeration, it can be seen that there has to be more than "proof of curiosity or concern in the litigation" or just "some interest in the outcome" (*Gleeson v. J. Wippell & Co* [1977] 1 WLR 510). There has to be "a sufficient degree of identification between the two parties" (per Megarry VC in *Gleeson, supra*).

[32] In the instant case, the test of sufficient degree of identification between IPMC and Prudential is amply met. IPMC is said to have taken over the collection of charges that were unpaid (for the purposes of an application to intervene it must be assumed that the charges were unpaid) from Prudential *albeit* through Imbi Plaza Management Services Sdn Bhd. For all intent and purposes there was privity of interest between Prudential and IPMC. More so where the latter consists of both the developer and proprietors of Imbi Plaza. I hold that IPMC is Prudential's privy and therefore based on the above reasoning that IPMC's application to intervene is thwarted by *res judicata*.

The Issue Of Limitation

[33] For completeness, it is necessary to address the two alternative issues concerning limitation raised by IPMC to show why *res judicata* of the earlier action is not an obstacle for it to intervene in Civil Suit 814 of 2018. The first, is that s. 105(2) of the SMA expressly excludes the application of the Limitation Act 1953 to proceedings of the Strata Management Tribunal. The case of *Perbadanan Pengurusan Megan Avenue 1 v. Harcharan S Sidhu & Anor* [2017] 9 CLJ 563 was cited to show that the non-application of the Limitation Act 1953 to proceedings before the Tribunal would also apply to proceedings before a court. As such, it was submitted that limitation was not an issue for IPMC to intervene and cannot be relied by Pauson. The second, is that limitation under the Limitation Act 1953 has not kicked in where the outstanding charges are part of a running account as decided by the Court of Appeal in *Ekuiti Setegap Sdn Bhd v. Plaza 393 Management Corporation* [2019] 2 CLJ 592. As such, it was submitted that there was no impediment for IPMC to intervene.

[34] In my view, the above reasoning is fatally flawed for it disregards the doctrine of *res judicata* or issue estoppel concerning limitation that has been adjudicated to finality in Civil Suit 420 of 2014 and seeks to reopen and adjudicate the issue of limitation again based on the law that came afterwards. I also hold that the instant appeal is distinguishable from *Harcharan S Sidhu* and *Ekuiti Setegap Sdn Bhd* (*supra*). In those cases, the issue of limitation was

being decided for the first time. There was no issue of *res judicata* there of an earlier decided action. In the instant appeal Civil Suit 420 of 2018 had already decided that the same charges were barred by limitation under the Limitation Act 1953. With the appeal process exhausted the decision of the Court of Appeal in Civil Suit 420 of 2018 became final and binding. The issue of limitation cannot therefore be reopened and made a basis for IPMC to intervene. Such action would be an abuse of the process of the court and must be nipped in the bud.

[35] The issue of *res judicata* concerning Claim 3687 and Claim 3501 at the Strata Management Tribunal. Both these claims were filed by IPMC against Pauson claiming the same outstanding charges that were claimed by Prudential in the Civil Suit 420 of 2014. Claim 3687 was dismissed given that the same outstanding charges were the subject matter of Civil Suit 420 of 2014. IPMC did not challenge the decision. Subsequently, IPMC filed Claim 3501 which was also dismissed based on the decision of the Court of Appeal in Civil Suit 420 of 2014. This time IPMC challenge the correctness of the decision by way of judicial review but leave to commence judicial review proceedings was dismissed. In my view, IPMC ought to have appealed against the decision of dismissal at the Court of Appeal. The failure rendered the decision of the Tribunal final and binding between IPMC and Pauson by virtue of s. 120(1) of the SMA which state:

> An award made under sub-s. 112(3) or s. 117 shall:
>
> (a) subject to section 121, be final and binding on all parties to the proceedings; and
>
> (b) be deemed to be an order of a court and be enforced accordingly by any party to the proceedings.

[36] I therefore hold that the decision in Claim 3501 is final and binding on IPMC in respect of the outstanding charges. In the circumstances, this is a separate reason that bars IPMC intervening in the civil suit.

The Issue That Res Judicata Would Lead To An Unjust Result

[37] The final point on the issue of *res judicata* is the complaint that the lower court failed to apply the *ratio decidendi* of the Court of Appeal decision of *Simpang Empat Plantation Sdn Bhd v. Ali Tan Sri Abdul Kadir & Ors* [2006] 1 CLJ 41 which was that the doctrine of *res judicata*, whether in its narrow or broader sense, is designed to achieve justice and the court may decline to apply it where to do so would lead to an unjust result. Suffice to say that the principle was not the *ratio decidendi* in view of the decision of the Federal Court not agreeing with the Court of Appeal in *Ali Tan Sri Abdul Kadir & Ors v. Simpang Empat Plantation Sdn Bhd* [2008] 5 CLJ 305 that the doctrine of *res judicata* applied on the facts of the case.

[38] Having said that, it behoves this court to consider the principle which was accepted and applied in cases such as *Chee Pok Choy & Ors v. Scotch Leasing Sdn Bhd* [2001] 2 CLJ 321; [2001] 4 MLJ 346; *Tanalachimy Thoraisamy* (*supra*); and *Francis Joseph Puthucheary v. Eng Securities Sdn Bhd* [2015] 4 CLJ 433 as it was a complaint in the memorandum of appeal.

[39] However, I find that the IPMC has not raised anything to displace the general principle that it is against public policy, and oppressive to the party to re-agitate disputes which have been litigated to a conclusion. Raising hardship of the decision or the effect of the decision is not enough. This is not a case where the issue estoppel does not apply or where the court lacked jurisdiction to make the order or where in the second suit the defective *locus standi* which resulted in the earlier suit being dismissed was rectified. In the instant case, the issue of limitation was the issue precisely raised and ventilated to final adjudication. Limitation was the basis of the judgment in Civil Suit 420 of 2014.

The Issue Of Right To Claim Outstanding Charges

[40] As a separate and independent reason I find that IPMC has no right to claim the outstanding charges as stated in the statement of accounts of Imbi Plaza Management Services Sdn Bhd. In other words, its legal interest is not affected. My reasons are as follows:

[41] IPMC raised the issue that its right to claim outstanding charges under s. 59(2) of the SMA would be affected. Thus, it is for IPMC to show how this section is applicable to the outstanding charges for the period 1 July 1998 to 20 June 2008. To connect itself to the outstanding charges, IPMC averred that it was established under the BCPA and since its establishment on 8 February 2007 had taken over the rights and duties to collect the charges. This is of crucial importance because the SMA which came into operation on 1 June 2015 and on the same day repealed the BCPA. However, the saving provisions in the SMA made actions taken under the BCPA valid and continue to have the force of law. As such, IPMC said that it was incorporated from 8 February 2007 as a management corporation under the BCPA and it continued under the SMA when the latter came into operation on 1 June 2015 and therefore entitled to rely on s. 59(2) of the SMA to claim the outstanding charges.

[42] But the story of IPMC is contrary to and not borne out by contemporaneous documentary evidence. The first of which is the certificate of incorporation of IPMC (p. 121 Rekod Rayuan Jilid 1). This document shows that IPMC was automatically incorporated pursuant to s. 39 of the STA 1985. But the document was only certified and confirmed on 5 March 2012. The second document is the statement of accounts alleging the outstanding charges was that of Imbi Plaza Management Services Sdn Bhd wherein the last item was dated 20 June 2008. This can only mean that IPMC had at the said date not taken over from Prudential.

[43] The other obvious fact is that IPMC was not established under the BCPA as alleged but under the STA 1985. This is borne out by the certificate itself which clearly states that the certificate is issued by the Registrar of Strata Titles under s. 39 of the STA 1985. Now, it must also be remembered that the BCPA was legislated to regulate the industry which was in chaos with developers doing their own thing (see *Lee Ming Chong Sdn Bhd* (*supra*). Most importantly, the BCPA makes no mention of a management corporation. It provided the establishment for the first time of a joint management body (JMB), consisting of the developer and proprietors, pending the issuance of the strata titles where the JMB provided the service of maintaining the common properties and the power to impose and collect service charges and the remedy for any non-payment. In the event of non-payment, the BCPA provided for a quick system of attachment of the moveable in the property or recovery by way of a civil debt. The savings provisions in the SMA provide that the JMB is deemed to have been established under the SMA and every account or fund established under the BCPA shall continue and be deemed to have been established under the SMA. In other words, there is a continuity of maintenance and sinking funds accounts that were maintained under the BCPA. Provisions were made for the transition of the JMB to the management corporation under the SMA.

[44] At the time the BCPA came into force on 12 April 2007 the certificate incorporating IPMC was yet to be issued. It was only issued five years later on 5 March 2012 pursuant to the STA 1985. The evidence shows that the first time that the IPMC tried to collect the outstanding charges under its own name was at the Strata Management Tribunal on 8 December 2017 based on the statement of accounts of Imbi Plaza Management Services Sdn Bhd. Therefore, IPMC was not established under the BCPA. There was no transition of IPMC from the BCPA to the SMA. In the circumstances, there was no transfer from Prudential, as developer, to IPMC under the BCPA.

Conclusion

[45] For the above reasons, the appeal is dismissed.